FOREIGN VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

PART II

II. WHERE THE CREDITOR IS A CITIZEN OF THE STATE OF THE ASSIGNMENT

HERE there is less contrariety in opinion, for the reason that the problem is a simpler one. Where a person deliberately contracts under the laws of one jurisdiction, and then discovers that the laws of another are more favorable to his claim, it would seem *prima facie* unfair to other parties interested to allow him to alter his legal standing by an appeal to foreign laws which were wholly outside the contemplation of the parties when the contract was made.

The case is well discussed in *Richardson* v. *Leavitt*.[1] Here an assignment for the benefit of creditors, with preferences, was made in New York, and was valid under its laws. An attachment was levied upon personal property in Louisiana by New York creditors. The court said:—

"The violation of the common pledge, by the undue preference given to the creditors for whose benefit the assignment is made, is the ground on which the plaintiffs base the invalidity of the assignment. By the laws of New York no such pledge exists, and the debtor is permitted to make any preferences, by payment in favor of some creditors to the detriment of others. The law of New York is the law of the contract between the plaintiffs and defendants. * * To extend the law of Louisiana to the contract made between these parties in New York, would be to give an extra-territorial application to them, unwarranted by any consideration."[2]

So in Illinois, in the case of *Woodward* v. *Brooks*,[3] an assignment for the benefit of creditors was made in Pennsylvania, and money was attached in Illinois by Pennsylvania creditors. The court held that, as the assignment was valid in Pennsylvania, and the attaching creditors were residents of that state, the assignment would be given effect as against them.

In *Einer* v. *Beste*,[4] the Supreme Court of Missouri went still further, and applied the same rule to the case of a foreign bankruptcy.

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[1] (1846), 1 La. Ann. 430.

[2] Cited and approved in Whitenright *v.* Leavitt (1849), 4 La. Ann. 351.

[3] (1889), 128 Ill. 222.

[4] (1862), 32 Mo. 240.

Defendants, residents of Louisiana, became bankrupt, and by virtue of the laws of Louisiana all their property passed to a syndic. Plaintiff was also a resident of Louisiana, and a creditor of defendants. He tried to secure himself by suing out an attachment against property of the defendants in Missouri. But the court refused to allow him rights which his own state denied him, saying that no good reason appeared why a creditor residing in the same state with the bankrupt, and subject to its local jurisdiction, should be permitted, through the courts of other states, to obtain an advantage over other creditors by attaching property outside the state of the assignment.[1]

This view seems to be all but universal in the United States. The following cases are directly in point, and sustain the doctrine without suggesting a doubt of its correctness: In Rhode Island, *Noble* v. *Smith*;[2] in Pennsylvania, *Bacon* v. *Horne*;[3] in Missouri, *Thurston* v. *Rosenfield*;[4] in Massachusetts, *Benedict* v. *Parmenter*,[5] *Martin* v. *Potter*,[6] *Daniels* v. *Willard*,[7] *Burlock* v. *Taylor*,[8] *Bholen* v. *Cleveland*;[9] in Vermont, *Ward* v. *Morrison*;[10] in New Jersey, *Moore* v. *Bonnell*.[11] In this last case the court declared that the rule was universal, and that whenever the decision was directly upon the point, the American courts had refused to allow the creditor, resident in the state of the assignment, to assail the assignee's title.

In *Faulkner* v. *Hyman*,[12] the attaching creditors constituted a partnership, some of the partners being residents of the state where the assignment was made, and others residents of Massachusetts. It was held that this did not preclude the partnership from attacking the assignment, although it was valid where made.

There is, however, one conspicuous instance of dissent from this general rule. The courts of New York make no distinction between creditors resident in the state where the assignment is made, and any other creditors, domestic or foreign. This was clearly laid down

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[1] In support of this doctrine the court cited Lowry *v.* Hall (1841), 2 W. & S. 129; Sanderson *v.* Bradford (1839), 10 N. H. 260; Whipple *v.* Thayer (1834), 16 Pick. 25; and Van Hook *v.* Whitlock (1841), 26 Wend. 43.

[2] (1860), 6 R. I. 446.

[3] (1888), 123 Pa. St. 452.

[4] (1868), 42 Mo. 474.

[5] (1859), 13 Gray, 88.

[6] (1858), 11 Gray, 37.

[7] (1834), 16 Pick. 36,

[8] (1835), 16 Pick. 335.

[9] (1828), 5 Mason 175 (U. S. C. C.)

[10] (1853), 25 Vt. 593.

[11] (1864), 31 N. J. L. 90.

[12] (1886), 142 Mass. 53.

in *Hibernia Nat. Bank* v. *Lacombe*,[1] and more recently in *Barth* v. *Backus*.[2] In the latter case the court, by Chief Justice Andrews, said:—

"We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here from the state of the common domicile upon the same footing as that of a citizen or resident creditor."

It seems, also, that the Supreme Court of Iowa is unwilling to recognize the general rule. In *Moore* v. *Church*,[3] all the parties were residents of New York, where the assignment, void by Iowa law, was executed. The court made no special point of the fact that the creditors were domiciled in the same state as the assignee, but held the assignment void on the ground that the Iowa property embraced by it was real property. But in *Franzen* v. *Hutchinson*,[4] the same question arose as to the personalty, and the court said it could see no reason for applying a different rule as to personal property, and held that where the assignment is invalid by the law of the forum, any one may raise the objection.

Aside from the New York and Iowa holdings, there appears to be no exception to the general rule, which is undoubtedly a just and equitable one, that the creditor cannot, in the courts of another jurisdiction, question the validity of an assignment for the benefit of creditors properly executed in his own domicile.

III. VALIDITY OF FOREIGN ASSIGNMENTS WHEN UNAFFECTED BY THE QUESTION OF CITIZENSHIP

The specific questions arising under this head are numerous, owing to the great variety in the details of assignment statutes. The classification adopted is more for convenience of treatment than to develop fundamental distinctions in principle. The chief ground of contention is over preferences, and this topic will therefore receive a fuller discussion than others.

PREFERENCES. In some states, following the common law, assignments with preferences are allowed, and in some they are even required. But in most states they are deemed fraudulent.

Now will the courts of a state in which such assignments are invalid, recognize the title of a foreign assignee under an assignment containing preferences, as against attaching creditors? No question of citizenship enters here. That has already been dis-

[1] (1881), 84 N. Y. 367.
[2] (1893), 140 N. Y. 230.
[3] (1886,) 70 Ia. 208.
[4] (1895), 94 Ia. 95.

posed of. The problem now relates solely to the substance of the assignment as entitling it to foreign recognition. Under the general rule that a court will refuse to sanction that which its own law or policy condemns, it might be supposed that a foreign assignment with preferences would be totally ignored in a state whose law or policy forbade preferences. But the decisions are very conflicting, for the reason that opinions differ as to the exact purpose which laws against preferences are intended to serve.

One line of cases holds that laws against preferences are intended solely to regulate domestic assignments, and that there is therefore no reason for questioning the validity of a foreign assignment with preferences, simply because it would have been void as to creditors, if executed within the state of the forum. A good example is afforded by *Egbert* v. *Baker*.[1] Here an assignment was made in New York, with preferences as allowed by the law of that state, but by the laws of Connecticut such an assignment was declared void. The court said:—

"The general principle is, that an assignment, or other contract, good where made, is good everywhere. But we are asked to make an exception to the rule on the ground that the assignment giving a preference to creditors contravenes the policy of our insolvent law, which forbids preferences and seeks to divide the assets ratably among creditors. In a legal sense it cannot be said that a contract, made in the State of New York, in strict conformity to the laws of that state, and by citizens of that or other states, contravenes the policy of our law. Our statute was not enacted for such contracts, and takes no cognizance of them. Such contracts may dispose of property in a manner not allowed by our law; but that does not concern us, and is certainly not a sufficient reason for giving our statute an extra-territorial jurisdiction, especially in a case between citizens of other states, the effect of which would be to deprive parties of vested rights."

So in Illinois, the statute against preferences is held to apply only to domestic assignments. In *May* v. *First Nat. Bank*,[2] a general assignment for the benefit of creditors, with preferences, was made in New York, covering land in Illinois. A citizen of Massachusetts attached the Illinois land. The deed of assignment was made in accordance with the Illinois law relative to the transfer of real property. Question, Was the assignment valid as against this attaching creditor? The court held that the preferences did not invalidate the assignment, because the Illinois statute prohibiting them applied in terms only to assignments executed in Illinois. Nor did the court think the assignment against the policy of the

[1] (1890), 58 Conn. 319.

[2] (1887), 122 Ill. 551.

state, since it was made without the state, and there was consequently no state policy in regard to it.

In *Law* v. *Mills*,[1] where it was objected by creditors that a new York assignment with preferences could not be enforced in Pennsylvania because the statute forbade all attempts by an insolvent debtor to prefer one or more creditors before others, the court held that unless it was shown that the assignment was void under the laws of New York, it would be recognized as valid in Pennsylvania, because, on the authority of *Speed* v. *May*,[2] "the validity of a voluntary assignment in trust is to be ascertained by the law of the place of its origin." The same opinion was expressed by the Supreme Court of Kentucky in *Matthews* v *Lloyd*.[3]

An interesting case in which the Supreme Court of the United States passed upon this question, in reference to the assignment laws of Idaho is *Barnett* v. *Kinney*.[4] A general assignment with preferences was made in Utah, valid by the laws there. It purported to convey property in Idaho, and the title of the assignee to that property was questioned by an attaching creditor domiciled in Minnesota. The assignee had already taken possession. The statute of Idaho prescribed that creditors should share pro rata, "without priority or preference whatever, and "no assignment of an insolvent debtor, otherwise than as so provided, is legal or binding on creditors." The court held that the assignment was neither in contravention of the Idaho statute, nor opposed to the public policy therein indicated in respect to citizens of the jurisdiction, since nothing was clearer than that the statute had reference only to domestic insolvents.

The same doctrine seems to prevail in Florida,—*Van Wyck* v. *Read;*[5] in New Jersey, *Bentley* v. *Whittemore*,[6] *Varnum* v. *Camp;*[7] in Oklahoma, *Williams* v. *Kemper, etc. Co.*,[8] based upon *Barnett* v. *Kinney;* in Missouri, *Thurston* v. *Rosenfield;*[9] in Louisiana, *Richardson* v. *Leavitt;*[10] and in Michigan, *Butler* v. *Wendell*.[11]

On the other hand, a few states take the opposite view, and refuse to recognize an assignment with preferences, when by their own law such assignments are void. Thus in *Strickler* v. *Tinkham*,[12] a

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1 (1851), 18 Pa. St. 185.
2 (1851), 17 Pa. St. 91.
3 (1890), 89 Ky. 625.
4 (1892), 147 U. S, 476, reversing 2 Idaho 706.
5 (1890), 43 Fed. R. 716 (U. S. C. C.)
6 (1868), 19 N. J. Eq. 462.
7 (1833), 13 N. J. L. 326.
8 (1896), 4 Okl. 145.
9 (1868), 42 Mo. 474.
10 (1846), 1 La. Ann. 430,
11 (1885), 57 Mich. 62.
12 (1866), 35 Ga. 176.

citizen of Tennessee made an assignment in that state, with preferences, covering property in Georgia. A creditor, not preferred, sued out attachments, after notice of the assignment, which were levied upon the Georgia goods. The court held that the assignment was obnoxious to the law of Georgia. The general rule was admitted, that the *lex loci* governs in determining the validity of a contract, but subject to exceptions. By the Code, Sec. 9, "The validity, form and effect of all writings or contracts, are determined by the law of the place where executed. When such writing or contract is intended to have effect in this state, it must be executed in conformity to the laws of this state." Hence this assignment, which was intended to have effect in Georgia, was held void, not having been executed in such terms as to be valid according to the Georgia statute."[1]

So in *Loving* v. *Pairo*,[2] a case often cited by the courts of that state, lands in Iowa were conveyed, in contemplation of insolvency, by deeds of general assignment for the benefit of creditors, which deeds were executed in the District of Columbia, the place of the grantor's domicile. By the terms of these deeds, the claims of certain creditors were preferred. It was held that the conveyance was repugnant to the laws of Iowa, and invalid as against a non-resident attaching creditor, and could not operate even as an assignment in favor of all the creditors in proportion to their respective claims.

The same doctrine is approved in Delaware, *King* v. *Johnson*;[3] and in Colorado, *Campbell* v. *Colorado Coal Co.*.[4] It seems, also, that the Mississippi rule is the same, though the point was raised only indirectly, in *Byers* v. *Tabb*.[5] In South Carolina the court has held that the statute against preferences is applicable to all assignments, whether domestic or foreign, *Ex parte Dickinson*,[6] though the statute construed in *Russell* v. *Tunno*,[7] was held to include only those executed within the state.

From the foregoing review of the cases, it is clear that the weight of American authority is against allowing a domestic law against assignments with preferences, to invalidate a foreign assignment containing them, when the law of the state where the assignment was made sanctions the preferences.

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[1] See, also, Mason *v*, Strickler (1867), 37 Ga. 262.

[2] (1859), 10 Ia. 282.

[3] (1848), 5 Harr. 31.

[4] (1885), 9 Col. 60.

[5] (1899), 76 Miss. 843.

[6] (1888), 29 S. C. 453.

[7] (1858), 11 Rich. L. 303.

RECORDING AND FILING. Another feature of a valid assignment, as prescribed in many states, is that it shall be recorded or filed in the manner indicated by the statute. This gives rise to another problem in the conflict of laws, namely: Will an unrecorded or unfiled deed of assignment, valid in the state where made, be recognized in a state requiring such recording or filing, as against attaching creditors?

There is here something of the same conflict of authority, and for the same reason, but the question just stated is even more generally answered in the affirmative than the same question relative to preferences.

An excellent case in point is *In re Paige Lumber Co.*[1] A general voluntary assignment for the benefit of creditors was made in Wisconsin, covering personal property in Minnesota. Its validity was questioned because it was not filed as required by the Minnesota statute. It was held that the statute applied only to domestic assignments, and did not affect the unwritten law relative to the validity of foreign assignments. The court said:—

"When we consider the general doctrine that the validity of foreign assignments, as of foreign contracts, is not to be determined by our laws, common or statute, regulating generally the making of assignments or contracts, but by the law of the place where the same was made, it is to be presumed that if the legislature had intended this act to apply to the case of foreign assignments, making them invalid here, when, but for the act, they would have been deemed to be valid, that purpose would have been particularly expressed. Such an intention is not to be inferred from the general terms in which this act is framed."

This, undoubtedly, states the true rule of construction to be applied to these statutes.

Wilson v. *Carson*,[2] is another excellent case illustrative of the same doctrine. A voluntary assignment for the benefit of creditors was made in Kentucky, and admitted to be valid there, but it was claimed that it could not operate to pass title to property in Maryland because not recorded under the Maryland statute. The court held, however, in an able opinion, that the recording statute could not be deemed to relate to foreign assignments, since it would in that event preclude persons living in distant countries from disposing of property in Maryland, because recording would be impossible within the twenty days, and since it would, indeed, prevent all non-residents from disposing of such property. because none of

[1] (1883), 31 Minn. 136.

[2] (1857), 12 Md. 54.

them could record the conveyance in the county in Maryland where they reside, not being residents of any county within the state.

Similar views have been expressed in New Jersey, in *Frazier* v. *Fredericks;*[1] in New York, in *Ockerman* v. *Cross;*[2] in Connecticut in *Atwood* v. *Ins. Co.*,[3] and *Richmondville Mfg. Co.* v. *Prall;*[4] and in Vermont, in *Hanford* v. *Paine*.[5]

But the Supreme Court of Tennessee dissents from this doctrine, apparently without an effort or desire to construe the statute more liberally. In *Douglas* v. *Bank*,[6] an Ohio assignment for the benefit of creditors was held void because not registered according to the statute. So in Virginia, in *Gregg* v. *Sloan*,[7] the court takes the position that an unrecorded foreign assignment would be void as to tangible property in Virginia, though not as to choses in action.

The statute of Pennsylvania, construed in *Steel* v. *Goodwin*,[8] is explicitly directed against foreign assignments, so that the court had no other course open but to insist upon compliance, and the Georgia statute, construed in *Strickler* v. *Tinkham*,[9] and *Mason* v. *Strickler*,[10] would perhaps be given the same construction in regard to recording as was given in regard to preferences.

ASSIGNEE'S BOND. In *Moore* v. *Title & Trust Co.*,[11] a Pennsylvania corporation assigned all its properly for the benefit of its creditors, including personal property in Maryland. Objection was made to the validity of the assignment because the trustee had not filed a bond, as required by the Maryland statute. *Held*, that this requirement applied only to assignments executed within the state of Maryland. The Wisconsin court, in *Cook* v. *VanHorn*,[12] took the same view. And in the very recent case of *Memphis Savings Bank* v. *Houchens*,[13] the United States Circuit Court of Appeals, for the eighth circuit, held that a Tennessee assignee obtained a valid title to property in Arkansas, as against attaching creditors, although he had failed to file a bond as required by the Arkansas statute, since, in the opinion of the court, the Arkansas statute was intended to apply only to domestic assignments.

INVENTORY ATTACHED TO ASSIGNMENT. An interesting case involving this point arose in Georgia, where on account of a par-

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1 (1853), 24 N. J. L. 162.
2 (1873), 54 N. Y. 29.
3 (1842), 14 Conn. 555.
4 (1833), 9 Conn. 487.
5 (1860), 32 Vt. 442.
6 (1896), 97 Tenn. 133.
7 (1882), 76 Va. 497.
8 (1886), 113 Pa. St. 288.
9 (1866), 35 Ga. 176.
10 (1867), 37 Ga. 262.
11 (1896), 82 Md. 288.
12 (1892), 81 Wis. 291.
13 (1902), 115 Fed. R. 96.

ticularly rigid and narrow statute, the courts have so frequently denied validity to foreign assignments which failed to meet the statutory test. But in this instance a much more liberal construction was given to the statute. The case was *Birdseye* v. *Underhill*.[1] An assignment was made in New York, and credits of the assignor were garnisheed in Georgia. It was claimed that the assignment was void in Georgia, although valid in New York, because it did not contain a full inventory of assets and liabilities, under the Georgia statute prescribing that when any writing or contract is intended to have effect in Georgia, it must be executed in conformity to the Georgia laws. But the court took the view that this assignment was not intended to have effect in Georgia, but generally wherever the assignor had property, and hence did not come within the terms of the statute. And furthermore, the court said that the schedules were no part of the contract, and it is only when the contract element violates the state law that the assignment is void. This construction would practically abrogate the statute so far as foreign assignments are concerned, and cannot be harmonized with the decisions in *Strickler* v. *Tinkham* and *Mason* v. *Strickler*, cited above.

The same question was raised in *Memphis Savings Bank* v. *Houchens*,[2] and in *Hanford* v. *Paine*,[3] and both the United States Circuit Court of Appeals and the Supreme Court of Vermont held that the statutory requirement was limited in its application to domestic assignments.

POSSESSION BY ASSIGNEE. But few cases have turned upon the question of possession in the assignee, as necessary to perfect the title of the assignee. In *Woolson* v. *Pipher*,[4] the court declared that possession of the goods was indispensable to the perfection of the assignees title, as against the liens of attaching creditors; while in *Union Savings Bank* v. *Lounge Co.*,[5] it was held that possession was not essential, but solely because of the peculiar nature of the property.

So in *Rice* v. *Curtis*,[6] the court held that failure on the part of the assignee to reduce the assigned property to possession, defeated his claim to the property as against attaching creditors, since possession went to the inherent validity of the assignment. On the other

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1 (1888), 82 Ga. 142.
2 (1902), 115 Fed. 96.
3 (1860), 32 Vt. 442.
4 (1884), 100 Ind. 306.
5 (1898), 20 Ind. App. 325.
6 (1860), 32 Vt. 460.

hand, the Supreme Court of Wisconsin, in *Mowry* v. *Crocker*,[1] declared that the assignment, *ipso facto*, vested the title in the assignee, and this would seem to be the better rule.

EXEMPTIONS. In *Pitman* v. *Marquardt*,[2] the question arose over a Kentucky assignment for the benefit of creditors, where the Kentucky law allowed a greater exemption than did the Indiana law, and the court held the assignment valid notwithstanding the difference as to the exemption.

As a result of the foregoing analysis of the case, it is clear that, by the great weight of American authority, statutes regulating assignments for the benefit of creditors are considered to relate to domestic assignments only, and the unmistakable tendency of the courts is to sustain the validity of foreign assignments which, while valid where made, do not conform to the local law. Any other doctrine would practically restrict the operation of assignments within the jurisdiction where executed, for the assignment statutes of the various states show a very considerable variety in detail. The cases clearly show a desire on the part of the American courts to give as full effect as possible to the general rule that contracts valid where made are valid everywhere, and to closely limit the scope of the exceptions which over-zealous creditors have sought to introduce into the law.

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[1] (1858), 6 Wis. 326.

[2] (1898), 20 Ind. App. 431.